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LIMITATIONS IMPOSED BY THE FEDERAL CONSTITUTION ON THE RIGHT OF THE STATES TO ENACT QUARANTINE LAWS.

II.

HAVING considered the meaning of the term "regulation of commerce," and the test to be applied in order to determine whether a law is such a regulation, let us now inquire whether quarantine laws fall within the class of regulations of commerce permissible to the States. Upon few subjects in our constitutional law are the doctrines still so unsettled as upon the construction of the clause granting the commercial power to Congress. The object of granting this power was twofold. First, to secure uniformity of regulation instead of the discriminating legislation by which the States had taxed and otherwise burdened the commerce of one State for the benefit of another;[1] and, second, to secure better commercial relations with foreign powers.[2] The clause does not appear in the Constitution in the way in which it was originally proposed. In the "Plan of a Federal Constitution" offered in the convention by Mr. Charles Pinckney, the clause appears thus: "The Legislature of the United States shall have the power . . . to regulate commerce with all nations

[1] Welton *v.* State of Missouri, 91 U. S. 275, 280.

[2] Curtis, History of the Constitution, Bk. iii. ch. iv.

and among the several States."[1] The committee of five to whom Mr. Pinckney's propositions were referred by the convention[2] reported back the clause unchanged, except that the word "foreign" was substituted for "all" before "nations."[3] The committee, consisting of one member from each State, to whom this clause among others was again referred,[4] added the words "and with the Indian tribes," and struck out the definite article before "power" at the beginning of what is now art. 1, sec. 8, of the Constitution.[5] These alterations were "agreed to *nem con.*," leaving the clause as it now stands. It is to be regretted that we have not the reasons of the committee for making this change, which had the effect of giving Congress power, instead of *the* power, to regulate commerce. But it is not unlikely, as pointed out by Mr. Emmet in his argument in Gibbons *v.* Ogden,[6] that the change was made in order to discountenance the idea that because certain powers had been granted to Congress they were to be construed as exclusive without more, depriving the States of any further rights to exercise the same powers. It was strongly intimated by Chief Justice Marshall in that case — and his reasoning can be explained on no other ground — that "as the word to 'regulate' implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing."[7] An important doctrine, supplementary to this statement, is laid down by the court five years later, in the case of Willson *v.* The Black Bird Creek Marsh Co.[8] The court had early held, unanimously, that the power granted Congress to "establish uniform laws on the subject of bankruptcies throughout the United States" did not render the State bankrupt law unconstitutional in the absence of congressional legislation.[9] Chief Justice Marshall had said, in the opinion of the court: "It is not the mere existence of the power, but its exercise, which is incompatible with the existence of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States."[10]

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[1] 5 Elliot's Debates, 130.
[2] *Ib.* 363, 376.
[3] *Ib.* 378.
[4] *Ib.* 503.
[5] *Ib.* 506, 507.
[6] 9 Wheat.,at p. 85 (1824).
[7] 9 Wheat., at p. 209 (1824).
[8] 2 Pet. 245 (1829).
[9] Sturges *v.* Crowninshield, 4 Wheat. 122 (1819).
[10] *Ib.* 251.

In Willson *v.* The Black Bird Creek Marsh Co., the Legislature of Delaware had authorized a company to reclaim a marsh by constructing a dam across a small navigable creek in which the tide ebbed and flowed. Willson and the other defendants, the owners of a sloop regularly licensed under the United States navigation laws, had broken and injured the dam in order to effect a passage. In defence to an action of trespass brought by the company, the defendants contended that the statute authorizing the dam was an unconstitutional regulation of commerce, relying on Gibbons *v.* Ogden. The Supreme Court, speaking through Chief Justice Marshall, unanimously held the statute constitutional. They pointed out that the legislation improved the value of the property, and probably the health of the inhabitants, near the marsh, adding: "Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States." Upon the point of regulating commerce, on account of the controversy to which this case has given rise, I quote the language of the court entire; "If Congress had passed any act which bore upon the case, — any act in execution of the power to regulate commerce, the object of which was to control State legislation over these small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, — we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, — a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." [1]

This case is interesting as the first in which the court passed upon the constitutionality of a law which they treated as a police regulation, claimed to be in conflict with the power of Congress to regulate commerce. The case has been a source of continual

[1] 2 Pet. 252.

controversy, but it has been repeatedly followed.[1] It lays down the same doctrine as to the power of Congress to regulate commerce that was laid down in Sturges *v.* Crowinshield, as to the power to establish bankruptcy laws. "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States." The language and reasoning of Gibbons *v.* Ogden, as explained by the shortly following decision in Willson *v.* The Black Bird Creek Marsh Co., seem to indicate the following doctrine. Congress has *an* exclusive power to regulate foreign and interstate commerce, which, while in exercise upon a given subject, precludes conflicting regulations by the States. The first question, therefore, in every case of a State law claimed to be in conflict with this clause of the Constitution, is whether Congress has regulated this subject.

In order to determine whether Congress has regulated a given subject under its power to regulate foreign and interestate commerce, the court has to construe the legislation, or the inaction, of Congress on that subject, as the case may be, for it is obvious that the absence of express legislation may indicate the will of Congress that no restraints shall be imposed whatever. To consider, first, the effect of legislation, it is to be said that the same question arises whenever a State law conflicts with a Federal one, for the Constitution provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[2] As said by Chief Justice Marshall, in Gibbons *v.* Ogden,[3] "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State legislatures as do not transcend their powers, but though

[1] See United States *v.* The New Bedford Bridge, 1 Wood. & M. 401, 424 (1846); License Cases, 5 How. 504, opinions of Taney, C. J., and Catron, J. (1847); Silliman *v.* The Hudson River Bridge Co., 4 Blatch. 409 (1859); Gilman *v.* Philadelphia, 3 Wall. 713 (1865); The Passaic Bridges, *ib.* 782; Escanaba Co. *v.* Chicago, 107 U. S. 678 (1882): Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811 (March 19, 1888).

[2] Art. vi. cl. 2.

[3] 9 Wheat 1, 210, 211.

enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." In that case the law of New York granting to Fulton and Livingston the monopoly of navigation by steam in the State waters was held void, as conflicting with the laws of the United States licensing the navigation of those waters. To take one other example: a State law authorized a bridge, which interfered with the passage of steamboats, to be constructed across a river flowing through several States. The law was held unconstitutional on the ground that commerce upon the river had been regulated by express congressional legislation.[1] Just as it is possible for Congress by express legislation to deprive the States of some of the power to regulate commerce which they previously possessed, so Congress can indicate by express legislation its will that a State shall not be deprived of the right to enact certain regulations of commerce previously permissible and constitutional. This, Congress has done in case of pilotage[2] and quarantine laws.[3] Congress can by adoption make valid a hitherto unconstitutional State regulation of commerce.[4] But it would seem that Congress cannot authorize commercial legislation by the States, for this would be a delegation by Congress of its powers.[5] It may be added that when Congress has by statute regulated a given subject, the statute would generally be construed to have expressed the whole mind of Congress upon that subject, so that any additional or supplementary laws by the States would be in conflict with the regulation exercised by Congress.

When, however, there is no express legislation upon the subject, the question whether Congress has exercised its power of regulation over it becomes more difficult; for the inaction of Congress has to

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[1] The first Wheeling Bridge case, State of Pennsylvania *v.* The Wheeling Bridge Co., 13 How. 518 (1851).

[2] U. S. Rev. Stat. 4235; Cooley *v.* Port Wardens, *post*, p. 298.

[3] U. S. Rev. Stat., Title lviii.; Morgan *v.* Louisiania, *post*, p. 300.

[4] Compare the second Wheeling Bridge case, State of Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421 (1855).

[5] See Cooley *v.* Port Wardens, 12 How. 299 (1857). This point was not passed upon in the decision. See, also, Gibbons *v.* Ogden, 9 Wheat. 1, 207.

be construed. A case which greatly simplified this question, and at the same time offered a solution to the much-vexed problem how far the States had the power to regulate foreign and interstate commerce, was Cooley *v.* The Port Wardens.[1] A pilotage law of Pennsylvania provided that every vessel neglecting or refusing to take a pilot when one could be had, should pay one-half the regular pilotage fee to the port wardens. The plaintiff in error was the consignee of a vessel which had thus neglected to take a pilot. To an action of debt by the Board of Wardens, he set up that the vessel was at the time engaged in interstate trade under a coasting license of the United States. The court, speaking through Mr. Justice Curtis, held that the law was such a regulation of foreign and interstate commerce as may be constitutionally enacted by the States in the absence of congressional legislation on the subject; that the nature of the power to regulate commerce does not in all cases require that a similar power should not exist in the States. "The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." The decision has been treated in the later cases as establishing the rule that, whatever subjects do not admit of a uniform national system, or plan of regulation, may be regulated by the States in the absence of congressional legislation upon the subjects.[2] The principle of Cooley *v.* Port Wardens has been made by the Supreme Court the basis of a rule of construction applicable to

[1] 12 How. 299 (1851).

[2] The rule in Cooley *v.* Port Wardens was hinted at as early as Gibbons *v.* Ogden, 9 Wheat. 1, 195 (1824). Cases in accord are case of the State Freight Tax, 15 Wall. 232, 279, (1872); County of Mobile *v.* Kendall, 102 U. S. 691 (1880); Transportation Co. *v.* Parkersburg, 107 U. S. 691 (1882); Brown *v.* Houston, 114 U. S. 622, 630 (1884), *semble*. Other cases are collected in Wabash Ry. Co. *v.* Illinois, 118 U. S. 557, 585, and Robbins *v.* Shelby Taxing District, 120 U. S. 489, 492 (1886). The principle was lately recognized in Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 676 (1888).

the inaction of Congress. It is thus stated by Mr. Justice Bradley, in the opinion of the court in Robbins *v.* Shelby Taxing District :[1] "Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom." An ample number of cases are cited in the opinion in support of this proposition.[2] The exception stated by Judge Bradley would seem to indicate that the rule was not absolutely rigid, but simply one of construction. This exception was made the ground of the decision in County of Mobile *v.* Kimball,[3] holding constitutional State legislation for the improvement of Mobile harbor. The court say: "Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority."[4] In the recent Iowa liquor-law case, Bowman *v.* Chicago & N. W. Ry. Co.,[5] the court say: "The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that until it positively interferes, such commerce may be left to be freely dealt with by the respective States." The question whether the inaction of Congress was to be taken as equivalent to a declaration that the interstate transportation of intoxicating liquors should be subject to no restraints, and there-

[1] 120 U. S. 489, 493 (1886).

[2] To the cases there collected the following may be added to complete the sequence of cases: Hinson *v.* Lott., 8 Wall. 148, 152 (1868); Welton *v.* State of Missouri, 91 U. S. 275, 282 (1875), perhaps the first case where the court lay down the rule; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 702 (1882); Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 336; Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689 (1888).

[3] 102 U. S. 691, 699 (1880).

[4] To the same effect is Transportation Co. *v.* Parkersburg, 107 U. S. 691 (1882).

[5] 125 U. S. 483, 8 Sup. Ct. Rep. 689, 697.

fore State regulation of the subject was excluded, was treated as an exceedingly nice question of construction.[1] Besides general reasoning, the court made use of various statutes of the United States, upon kindred subjects, to interpret the failure of Congress to regulate the matter by legislation.

The preceding discussion of the general doctrines pertaining to the regulation of foreign and interstate commerce has seemed necessary to a clear understanding of the grounds upon which quarantine laws are to be sustained, and the limits within which they are constitutional. The right of the State to enact quarantine laws has been assumed from the beginning in the decisions of the Supreme Court, and was never brought into question down to so late a date as 1885. In Gibbons *v.* Ogden[2] these laws are named by Chief Justice Marshall as a component part "of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government." It is also said of quarantine laws, "The constitutionality of such laws has never, so far as we are informed, been denied." Many *dicta* to the same effect may be found in later cases.[3] In Peete *v.* Morgan,[4] the court say, "That the power to establish quarantine laws rests with the States, and has not been surrendered to the general government, is settled in Gibbons *v.* Ogden." In Morgan *v.* Louisiana,[5] the plaintiff in error had obtained in the court of original jurisdiction an injunction against the Louisiana Board of Health, forbidding the collection of the fee allowed for examination of vessels by the quarantine laws of the State. This decision was reversed by the Supreme Court of Louisiana.[6] The Supreme Court of the United States, speaking through Mr. Justice Miller, expressed an opinion substantially as follows: Since the statute provided that the fees collected should go wholly to defray quarantine expenses, and the fees were in compensation for services actually rendered, there was no tax or duty of tonnage im-

[1] In Groves *v.* Slaughter, 15 Pet. 449 (1841), the court were of the opinion that a State could prohibit the introduction of slaves for the purpose of sales without violating the commercial clause of the Constitution.

[2] 9 Wheat. 1, 203, 205 (1824).

[3] For example, in City of New York *v.* Miln. 11 Pet. 102, 142 (1837); The License Cases, 5 How. 504, 581, 632 (1847); Passenger Cases, 7 How. 283, 414, 484 (1849); Gilman *v.* Philadelphia, 3 Wall. 713, 730 (1865).

[4] 19 Wall. 581, 582 (1873).

[5] 118 U. S. 455 (1886).

[6] Railroad and Steamboat Company *v.* Board of Health, 36 La. An. 666 (1884).

posed. The law was, indeed, necessarily a regulation of commerce with foreign nations and among the several States, since it interrupted the voyage of vessels coming from other States. Nevertheless, such legislation was permissible to the State, for (1) Congress had expressly recognized the power of the States to enact quarantine laws,[1] and (2) such laws belong to the class of local regulations which are valid until displaced, or contravened by congressional legislation. The subject of quarantine requires rules varying with the locality, and so falls within the rule established by the closely analogous case of Cooley *v.* Port Wardens.

The position taken by the court seems a strong one, although it may not be altogether clear that the subject of quarantine does not in fact admit of a national, uniform plan or system of regulation. At least it may be said that the States have power to pass such regulation because the power of Congress to regulate commerce has remained upon the subject "in its dormant state," for there is express legislation by Congress to show that it has never intended to take away the regulation of that subject from the States. In addition to the cases already cited, there are decisions of the Supreme Courts of Missouri[2] and Massachusetts affirming the constitutionality of quarantine laws. In the Massachusetts case a regulation was held constitutional which required that *all* rags arriving from any foreign port, before being discharged, should be disinfected in a manner satisfactory to the Board of Health, at the expense of the owner.[3] Another ground upon which to sustain such a law as the one just referred to is suggested by the court in Bowman *v.* Chicago & N. W. Ry. Co., just cited, in order to avoid the argument from analogy used by the dissenting judges. It is said that a State may exclude such articles as infected rags, diseased cattle, or decayed meat, because "such articles are not merchantable. They are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and cause of destruction to human health and life." It may be asked, Who is to determine when a given article is "merchantable," or a "legitimate subject of trade and commerce"? Under the court's decision, the States cannot

[1] U. S. Rev. Stat., Tit. lviii.

[2] City of St. Louis *v.* McCoy, 18 Mo. 238 (1853); s. c. 19 Mo. 13.

[3] Train *v.* Boston Disinfecting Co., 144 Mass. 523 (1887). See, also, Bowman *v.* Chicago & N. W. Ry. Co., 8 Sup. Ct. Rep. 689, 700; s. c. 125 U. S. 465.

decide this question. The court itself would hardly assume the prerogatives. There is nothing left but to construe the action or inaction of Congress upon the subject. Perhaps the case of the infected rags may be distinguished from that of intoxicating liquors, upon the ground that the inaction of Congress is to be construed differently upon the two subjects.[1]

Having seen that the power of Congress to regulate commerce does not deprive the States of the right to enact quarantine laws in the absence of express legislation by Congress upon the subject, we will now inquire what limitations that power of regulating imposes upon the scope of the provisions of such laws. Only with great hesitation can any generalization be offered upon a subject as yet so inchoate and undeveloped by decisions, at the same time so important as involving the limits of State power. Some limit, however, there must be. It cannot be permitted that a State, although legislating upon an appropriate subject, should embarrass the commerce of the whole country by unnecessary and indiscriminate legislation. It would be equally improper to deny to a State legislative power to the extent necessary to render effective laws upon subjects appropriate to the States. Between these limits two rules are conceivable: first, to allow the States any *reasonable* regulations; second, any absolutely *necessary* regulations. In such a matter, however, as State interference with foreign and national commerce, it may be said that only that legislation is reasonable which is absolutely necessary. Of course a court would be very loath to decide that a particular regulation of a quarantine law was unnecessary for the protection of health. Yet, however delicate the questions involved, the provisions of a quarantine law are legally no more sacred than any other police regulation; and after every reasonable presumption in favor of their validity, the court is still bound to use its common sense in the matter. The question is, When do State regulations of foreign and interstate commerce permissible in regard to their subject become unconstitutional on account of their scope? The Constitution-makers dealt with just this question in the case of State inspection laws, and have given an express rule in that instance: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be *absolutely*

[1] See U. S. Rev. Stat., Tit. lviii., recognizing the health laws of the States.

necessary for executing its inspection laws."[1] The true answer to the question proposed is believed to be a generalization of the rule given by the Constitution. It is interesting to notice how near the language of the courts has unconsciously approached that of the Constitution. We shall be necessarily confined, in our inquiry, to analogous cases, for this question has not yet arisen in case of a quarantine law. It has been intimated, however, and can hardly be doubted, that although a State quarantine law may tax a vessel with the cost of inspection,[2] it cannot constitutionally thus exact more than is necessary to defray quarantine expenses.[3] Such excessive fees would probably be treated as in conflict with the regulation of commerce by Congress under the rule established by Brown *v.* Maryland.[4] Of course the expression "absolutely necessary" is to be taken with a grain of salt, for in one sense no provision is absolutely necessary. Essential to the accomplishment of the purpose of the law seems to be the idea.

It was said by Mr. Justice McLean in the License Cases,[5] "To guard the health and safety of the community, the laws of a State may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of a general commercial law is limited to the existing exigency." The cases applying this rule are comparatively recent. One of the first is *In re* Ah Fong.[6] A California statute provided for the inspection of alien immigrants, and prohibited the landing of any person who had been a pauper or was likely to become a public charge, any convicted criminal or lewd woman, unless a fee was paid or a penal bond given on behalf of the vessel to save harmless any State municipality from expense on their account. The plaintiff, a Chinese woman, being detained on board a vessel by order of the inspector, sued out a writ of *habeas corpus* before the United States Circuit Court. Mr. Justice Field conceded that "the police power of the State may be exercised by precautionary measures against the increase of crime and pauperism, or the spread of infectious diseases. . . . . But

[1] Constitution, Art. i. sec. 10.

[2] Passenger Cases, 7 How. 283, 484 (1849); Morgan *v.* Louisiana, *supra*.

[3] Passenger Cases, 7 How. 283, 570; Patterson's Federal Restraints on State Action, 117.

[4] 12 Wheat. 419 (1827).

[5] 5 How. 504, 592 (1847).

[6] 3 Sawyer, 144 (1874).

the extent of the power of the State to exclude a foreigner from its territory is limited by the right of self-defence."[1] The statute in question exceeded that limit, and was unconstitutional. Upon the same facts, the same rule was laid down by the Supreme Court in Chy Lung *v.* Freeman,[2] speaking through Mr. Justice Miller: "We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exists. Such a right can only arise from a vital necessity for its exercise, and cannot be claimed beyond the scope of that necessity." The development of this line of decisions was cut short by Henderson *v.* Mayor of New York,[3] a case arising from a similar law of New York, applying, however, to all passengers without discrimination. The court held that the object of foreign immigration admitted of a national uniform rule, and its regulation by the States for any purpose whatsoever was in conflict with the power to regulate commerce granted to Congress.[4] The question whether or how far the States can exclude *actual* paupers or convicts was left open.

The most important case on this question, and one which may fairly be said to lay down the principle that a State police law cannot constitutionally interfere with foreign or interstate commerce to a greater extent than the strict necessity of the case requires, is Railroad Co. *v.* Husen,[5] overruling the Supreme Court of Missouri. An act of the Missouri Legislature provided that no Texas, Mexican, or Indian cattle should be conveyed into the State during a period comprising eight months in each year. Transportation of such cattle by railroads or steamboats through the State without unloading was expected, but the carriers were made liable for all damage from Texas cattle-fever communicated along the route. An action was brought against a railroad company under the latter provision. A similar action under an Illinois statute, forbidding entirely the importation or keeping of Texas cattle, had been held constitutional by the Supreme Court of Illinois,[6] upon the grounds that the act was a police regulation, and therefore it was unnecessary to decide whether or not it was a regulation of commerce;

[1] 3 Sawyer, 152. [2] 92 U. S. 275, 280 (1875). [3] 92 U. S. 259 (1875).
[4] People *v.* Compagnie Gén. Transatlantique, 107 U. S. 59 (1882), *accord.*
[5] 95 U. S. 465 (1877). [6] Yeazel *v.* Alexander, 58 Ill. 254 (1871).

that the extent of prohibition necessary for the purpose of the law was a question for the Legislature, not subject to the supervision of the courts, unless in case of "glaring abuse of power." It is instructive to compare with this the reasoning of the Supreme Court, in their unanimous opinion, delivered by Mr. Justice Strong. The first proposition is, that the law in question "is a plain regulation of interstate commerce, — a regulation extending to prohibition." It is conceded that under the police power a State is justified in excluding "property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. . . . But whatever may be the nature and reach of the police power, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. . . . While for the purpose of self-protection it [the State] may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.[1] It may not, under cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." Henderson *v.* The Mayor of New York and Chy Lung *v.* Freeman are there cited, and it is said: "Neither of these cases denied the right of the State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. . . . They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise, wherever it interferes with the rights and powers of the Federal government." The court refused to concur with Yeazel *v.* Alexander in holding that the courts could not inquire whether the prohibition did not extend beyond the dangers to be apprehended, saying, that, as the range of the police power of the State "sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

[1] Quoted with approval by the court in Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465, 492, 8 Sup. Ct. Rep. 689, 702 (1888). At p. 513, in the dissenting opinion of Waite, C. J., Harlan and Gray, JJ., it is said, "It was only because the Missouri statute embraced cattle that were free from the disease that it was declared unconstitutional."

The doctrine of the case seems to be that a State police law which obstructs interstate commerce to a greater extent than is strictly necessary for the accomplishment of the purpose of the law, is an unconstitutional regulation of commerce. At the argument, counsel were compelled to admit that Texas cattle kept for a certain time away from their native range — for example, wintered in Iowa or Nebraska — would not impart the disease, but would be excluded by the law.[1] The principle of the case applies to quarantine laws as well. The Missouri law seems indistinguishable from a quarantine law, save in the scope of its prohibitory provisions. Instead of only for a few days, the dangerous property was forbidden entrance during eight months; instead of only a few ports, a large territory was included in the prohibition. To that extent the temporary and local character of quarantine regulations was lost. As the court points out, the law provided for no examination to determine what cattle were diseased. A quarantine to be effectual must exclude all persons or property dangerously liable to impart the disease. Texas cattle, not themselves betraying any symptom of disease, it is said, can impart it. Moreover, an examination is material only because it diminishes to a minimum the prohibition of intercourse with the region quarantined against. This reasoning of the court applies with equal force to State port regulations, pilotage, inspection, and quarantine laws. The line must be drawn somewhere, and it is conceived that the rule in the Railroad Company *v.* Husen draws it just where the Constitution makers intended, and indeed at the only place possible in the nature of the subject, giving to the States all necessary power, but protecting foreign and interstate commerce from unnecessary interference. The conclusion we have reached from this line of cases is that a quarantine law whose provisions burden foreign or interstate commerce to an extent greater than the protection of health requires, is an unconstitutional regulation of commerce by the State.

The rule in Railroad Company *v.* Husen would seem to apply with equal force to a quarantine declared, it may be on account of a popular panic, under circumstances in which it was "so clear and palpable as to be perceptible to any mind at first blush" that there was no reason to apprehend danger from the place quarantined against. It may fairly be said to be absolutely necessary

[1] Note by counsel in 6 Cent. Law Jour. 217.

to the protection of the public health that a quarantine should be declared whenever there is reasonable apprehension of danger of pestilence from the place quarantined against, no matter if it turned out later that there was no actual danger. A court ought not, in so serious a matter to interfere except in a case clear beyond a reasonable doubt.[1] But if such a case is before them, it seems the unnecessary regulation of interstate or foreign commerce ought to be declared unconstitutional; for since it was in no sense necessary to the protection of health, it cannot shelter itself under the police power. The question is, not whether danger actually existed, but whether there was sufficient reason to apprehend danger to justify the establishment of a quarantine law; and if this question admits of a reasonable doubt, the quarantine must be declared constitutional, at least unless it is maintained after all reason to believe it necessary has ceased. The only authorities of direct application the writer has found are *dicta* of Chief Justice Taney in The Passenger Cases,[2] and of the Court of Appeals of Maryland, in an early case.[3] Chief Justice Taney goes to the length of saying, "However groundless the apprehension, and however injurious and uncalled for such [quarantine] regulations may be, still, if adopted by the State, they must be obeyed, and the courts of the United States cannot treat them as nullities." These *dicta* would go so far as to exclude any interference by the courts, at least so long as there was no enactment of laws for other and unlawful purposes under color of quarantine laws. In point of authority the *dicta* alluded to cannot be considered of much weight.

There is additional reason to regard as unconstitutional a quarantine regulation clearly not necessary for the protection of health, when the regulation is also manifestly enacted for other purposes; for example, as a commercial retaliation for being quarantined against,—a not infrequent resort in order to compel the

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[1] The question left before the court is just such a one as arises when a court is called upon to reverse the action of a jury or a lower court in deciding questions of fact. In order to interfere, the court must be satisfied clearly that upon the evidence presented reasonable men could not fairly have reached that decision. There must be no room for a reasonable difference of opinion. See an article on "Constitutionality of Legislation: The Precise Question for a Court." The Nation, April 10, 1884.

[2] 7 How. 283, 484 (1849).

[3] Harrison *v.* Mayor and City Council of Baltimore, 1 Gill, 264, 277 (1843). See, also, an article on Quarantine Law in 1 South. L. J. & Rep., pp. 161, 173 *et seq.*

repeal of a quarantine regulation considered to be unjust. It was said by Mr. Webster, in his argument in Gibbons *v.* Ogden,[1] "While a health law is reasonable, it is a health law; but if under color of it enactments should be made for other purposes, such enactments might be void." As is said by the Supreme Court of Massachusetts, in the case of Austin *v.* Murray,[2] "The law will not allow the right of property to be invaded under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation." In that case the selectmen of the town of Charlestown had been authorized by statute to make regulations for the interment of the dead, and to "establish the police of the burying-grounds." They made a by-law that no one should bring any dead body into the town for burial without the written consent of a majority of the selectmen. One of the grounds upon which the by-law was held void was that it was manifest that it was "not a police regulation, made in good faith, for the preservation of the health." This principle has been recently applied by the New York Court of Appeal, in the Matter of Application of Jacobs,[3] holding unconstitutional a law prohibiting the manufacture of cigars in tenement-houses, as depriving persons of liberty and property in the guise of a police regulation. The doctrine was recently approved by the Supreme Court in Mugler *v.* Kansas,[4] in an emphatic statement.[5] Constitutional limitations cannot be evaded by adopting the guise of police regulations.

The question before the court in such a case seems to be much the same as the one whether in a given case a tax has been levied, or the right of eminent domain exercised for a public purpose. The rule in case of taxation is thus stated by Judge Cooley: "Primarily, the determination, what is a public purpose, belongs to the Legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable. All cases of doubt must be solved in favor of the validity of legislative action for the obvious reason that the question is legislative, and only

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[1] 9 Wheat. 1, 20 (1824).

[2] 33 Mass. 121, 126, (1834).

[3] 98 N. Y. 98 (1885.)

[4] 123 U. S. 623, 661 (1887);

[5] *Dicta* to the same effect will be found in State *v.* Fisher, 52 Mo. 174, 177 (1873); Train *v.* Boston Disinfecting Co., 144 Mass. 523, 587 (1887); Powell *v.* Commonwealth of Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, April 9, 1888; s. c. 16 Wash. Law Rep. 272.

becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings and declare a levy void when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush." [1] A very similar question has arisen in case of the regulation by the Legislature of corporations holding inviolable charters. Such laws, purporting to be police regulations, "must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not under pretence of regulation take away from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." [2] If it be clear and manifest beyond a reasonable doubt that under color of quarantine a regulation seeks to accomplish other and unlawful purposes, a court is authorized to declare it unconstitutional. It seems necessary, however, that an express constitutional provision should be violated.

It may be contended with some force that when a quarantine regulation is not a *bonâ fide* exercise of police power, it deprives a person of liberty or property without due process of law, within the meaning of the Fourteenth Amendment. As we have seen, it is practically impossible for "process of law" to be provided by quarantine laws on account of their necessarily summary character. It is, of course, out of the question that one compelled to submit to sanitary regulations imposed to prevent actual or reasonably apprehended danger should be heard to say that his constitutional rights had been violated simply because, as it turned out, there was no danger of his communicating the disease. "Such a position, if pushed to its logical conclusion, would utterly overthrow the exercise of the police power by the State." [3] But in the case we are now considering, the police power is out of the question. That the deprivation is only temporary can make no difference. The question would, however, be a nice one, for

[1] Cooley, Princ. Const. Law, 58, 59. See, also, S. & V. R. R. Co. *v.* City of Stockton, 41 Cal. 147, 175 (1871); The Tide Water Company *v.* Coster, 18 N. J. Eq. 518, 521 (1866).

[2] Cooley, Const. Lim. 4th ed. 719.

[3] State *v.* Addington, 77 Mo. 110. 117 (1882), an oleomargarine case. See, also, Train *v.* Boston Disinfecting Co., 144 Mass. 523, 531 (1887).

while the person in quarantine is forcibly prevented from going to the only place to which he desires to go, from carrying his goods to the only point to which he chooses to take them, he is unrestricted as to going or taking his goods anywhere else.[1] An act prohibiting the manufacture or sale of substitutes for dairy butter, however wholesome, was held unconstitutional in New York, on the ground that the statute being clearly only a colorable police law, the makers of oleomargarine were deprived of their liberty without due process of law.[2] The same view is expressed by Mr. Justice Field, in Mann *v.* Illinois.[3] "By the term 'liberty,' as used in the provision [Fourteenth Amendment], something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with equal rights of others, as his judgment may dictate for the promotion of his happiness."[4] When the action of one becomes inconsistent with the equal rights of others, it is the province of police legislation to determine.[5] This idea has been paradoxically expressed as follows: "By the police power we understand a power vested in executive officers of the government under certain circumstances to deprive a person of liberty or property without process of law."[6] According to this view, the moment the quarantine regulation ceases to be a *bonâ fide* exercise of police power, it violates the Fourteenth Amendment by depriving a person of liberty or property without due process of law.

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[1] Compare Bird *v.* Jones, 7 Q. B. 742.

[2] The People *v.* Marx, 99 N. Y. 377. See, also, Matter of the Application of Jacobs, 98 N. Y. 98 (1885). The decision in State *v.* Addington, 77 Mo. 110 (1882), and Powell *v.* Commonwealth, 114 Penn. St. 265 (1886), are not *contra* upon this point, for they proceed upon the ground that the law must be considered a *bonâ fide* police regulation for the prevention of fraud, such as, for example, an act prohibiting the sale of pure milk mixed with pure water. Commonwealth *v.* Waite, 11 All. 264 (1865). The Pennsylvania decision has since been affirmed by the Supreme Court, upon the ground that the court was unable to affirm that the legislation had no real or substantial relation to the protection of the public health, or the prevention of fraud. If such were not the case, however, it is intimated that the Fourteenth Amendment would be violated. Powell *v.* Commonwealth of Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992 (April 9, 1886); s. c. 16 Wash. Law Rep. 262.

[3] 94 U. S. 113, 142 (1876).

[4] See, also, the Slaughter-House Cases, 16 Wall. 36, dissenting opinion of Bradley, J., at p. 122; Swayne, J., at p. 127.

[5] Mugler *v.* Kansas, 123 U. S. 623, 660 (1887).

[6] 6 N. J. Law Journal, 135.

It is conceived, however, that such a regulation may be held unconstitutional without resort to the doubtful, and, as the writer believes, strained, constitutional construction of the above view. In the case of Crandall *v.* State of Nevada,[1] the Supreme Court held unconstitutional a statute of Nevada imposing a tax of one dollar upon every person transported out of the State by a carrier, upon the ground, amongst others, that it was one of the rights of citizens of the United States to have access to the seat of government, the ports of entry, and the various Federal offices and courts throughout the United States. As no constitutional principle works in isolation independently of others, it is improbable that a *bonâ fida* police regulation of a State would be treated as a violation of this right. Yet when the law, purporting to be for the protection of health, establishes a quarantine clearly for other purposes, it would seem to be no longer within the protection of the police power, and to become unconstitutional under the decision of Crandall *v.* State of Nevada, as "abridging the privilege or immunities of citizens of the United States," in violation of the Fourteenth Amendment.[2] Such a law would also be, it is conceived, necessarily an unconstitutional regulation of commerce by a State. If, as we saw reason to think, a State cannot, even in the *bonâ fida* exercise of its police power, burden foreign or interstate commerce to an extent greater than is absolutely necessary to accomplish the purpose of the law, *à fortiori* a State cannot regulate such commerce under the mere pretence of police legislation. Whatever may be thought of the rule in Railroad Co. *v.* Husen,[3] it seems beyond question that a State cannot in the guise of police regulations impose burdens or restrictions which, as in case of quarantine laws, operate directly and immediately upon foreign or interstate commerce itself.[4]

The above considerations apply to quarantine regulations enacted by the States as well as to those enacted by local or general boards of health, acting under powers conferred by the Legislature. In the latter case, however, there must be considered the additional element, in what terms the delegated powers are granted. It is surmised that such a board would seldom be found, upon a

[1] 6 Wall. 35 (1867); and see Corfield *v.* Coryell, 4 Wash. C. Ct. 371, 381.

[2] See Slaughter-House Cases, 16 Wall. 36, at p. 79 (1872).

[3] 95 U. S. 465 (1877).

[4] *Supra*, p. 277.

true construction, to have power to declare a quarantine for any other purpose than the protection of the public health.

One other limitation upon the rights of the States to enact quarantine laws remains to be considered, namely, the effects of quarantine legislation by Congress under its power to regulate commerce. If Congress can constitutionally enact quarantine laws, as we have seen the Constitution make them, the "supreme law of the land," all conflicting State legislation becomes void. That Congress has the right to pass quarantine laws has been the opinion expressed by some of the greatest commentators upon the Constitution.[1] If a quarantine law is in its nature a regulation of foreign and interstate commerce, it follows that Congress has power to enact it. In the language of Judge Cooley, repeatedly quoted by the Supreme Court,[2] "It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and to whatever extent ground shall be covered by these directions, the exercise of State power is excluded. Congress may establish police regulations, as well as the States; confining their operation to those subjects over which it is given control by the Constitution."[3] Turning to judicial opinions, it is intimated by Chief Justice Marshall, in Gibbons *v.* Ogden,[4] that possibly Congress has power to pass laws upon such subjects as quarantine "for national purposes" where the power "is clearly incidental to some power which is expressly given."

It is said by Mr. Justice Wayne, in the Passenger Cases,[5] that the States retain under the Constitution "qualified rights to protect their inhabitants from disease; imperfect and qualified, because the commercial power which Congress has is necessarily connected with quarantine. And Congress may, by adoption, presently and for the future, provide for the observance of such State laws, making such alterations as the interests and convenience of commerce

[1] Tucker's Blackstone, App. 251 (1803); 2 Story, Const. 1071; Cooley, Princ. Const. Law, 74; Const. Lim. 5th ed. 724 (*586). The opposite view is taken in an article upon Quarantine Law, 1 South. L. J. & Rep. 160 (1881).

[2] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 215 (1884); W. U. Telegraph Co. *v.* Pendleton, 122 U. S. 347, 355.

[3] Cooley, Const. Lim. 5th ed. 724 (*586).

[4] 9 Wheat. 203, 204 (1824).

[5] 7 How. 283, 424 (1849).

and navigation may require, always keeping in mind that the great object of quarantine shall be secured." That Congress has power to assume entire control of the matter of quarantine is taken for granted by the court in Morgan *v.* Louisiana.[1] Indeed, at this time the question seems hardly to admit of doubt.

The principal actual legislation of Congress upon this subject has been as follows:[2] The first act upon the subject, approved May 27, 1796, authorized the President "to direct the revenue officers, and the officers commanding forts and revenue-cutters, to aid in the execution of quarantine, and also in the execution of the health laws of the States, respectively, in such manner as may to him appear necessary."[3] This was repealed by the Act of February 25, 1799,[4] preserved in Title LVIII. of the Revised Statutes. This act requires United States revenue and other officers to observe, and, under the direction of the Treasury, to aid in the execution of the health laws of the States. Additional clauses provide specifically for the execution of the United States revenue laws in such a manner as not to conflict with State quarantine laws. The Act of April 29, 1878,[5] provides that no vessel or vehicle, coming from foreign ports or countries where contagious or infectious diseases may exist, or carrying persons, merchandise, or animals affected with such disease, shall enter any port of the United States, or pass its boundaries with foreign States, contrary to the provisions of the quarantine laws of any State into or through which the vessel or vehicle may pass, and except subject to additional regulations, to be prescribed as the act provides. This language is broad enough to cover quarantines by land as well as by sea. The act also provides for reports by the United States consuls of the sanitary condition of infected ports, and of vessels leaving for the United States having on board passengers or merchandise from districts infected with cholera or yellow fever. The Surgeon-General of the Marine Hospital Service is charged with the duty of framing additonal rules and regulations for the execution of the act not in conflict with the present or future

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[1] 118 U. S. 455, 464 (1885).

[2] Collected in House Report, No. 392, 43d Cong. 1st Session.

[3] Story's Laws of U. S. 432.

[4] Story's Laws of U. S. 564, or 1 U. S. Stat. at Large, 619.

[5] 20 U. S. Stat. at Large, 37, or 1 Supplement to Rev. St. of U. S. 313. See, also, *ib.* pp. 480, 501, for the acts establishing a national board of health, with advisory powers.

State or municipal quarantine regulations. The medical officers of the Marine Hospital Service and customs officers are required to aid in the enforcement of these rules. Provision is made to employ State quarantine officers in the national system, and to establish quarantines at ports where State or municipal ones do not exist, if necessary. Pains are taken that quarantine regulations under State laws shall not be interfered with. The details of the act are somewhat elaborate, and may be laid to provide a national system of quarantine supplementary to and concurrent with the system of the States. In the matter of the importation of infected cattle and hides, Congress has enacted health laws, more stringent than quarantine regulations, resembling the law of Missouri held unconstitutional in the case of Railroad Company *v.* Husen.[1]

The principal conclusion of this article may be stated as follows: A State may not constitutionally, in the exercise of its police power, either enter the domain of legislation, which, under the Constitution, exclusively belongs to Congress, or violate the prohibitions imposed by the Constitution upon the States. For example, it seems a State cannot constitutionally enact a law which operates, to the extent of regulation, directly and immediately upon foreign or interstate commerce itself. To this rule, quarantine laws, perhaps upon historical grounds, form an exception. In determining whether a statute is a regulation of commerce, the operation of the law, not the intention of the Legislature in passing it, is the test to be applied. State laws which operate upon foreign or interstate commerce only indirectly, secondarily, and remotely, are not unconstitutional as regulations of commerce. The power of Congress to regulate commerce with foreign nations and among the several States does not exclude commercial regulations of a subject by the States, except when the power of Congress is in exercise upon that subject. Congress may exercise its power of regulation either by express legislation, which, to the extent that the will of Congress is expressed, abrogates all conflicting State laws; or by refraining from legislation, which, except in case of subjects to which a national uniform system of regulation is not appropriate, is to be taken generally as indicating the will of Con-

[1] *Supra*, p. 304. The acts of Congress are found in 14 U. S. Stat. at Large, 1, 3, or U. S. Rev. Stat. ss. 2493–2495 (1865 and 1866).

gress that foreign and interstate commerce shall be subjected to no restraints. But such subjects as do not admit of a uniform national system of regulation may be regulated by the States, where these subjects have not been regulated by congressional legislation. State quarantine laws are constitutional as coming under this exception, or, perhaps, on account of the dormancy of the power of Congress to regulate commerce, in relation to the part of the subject of quarantine covered by these laws. Yet a State cannot by the provisions of a police law burden or obstruct foreign or interstate commerce to a greater extent than is essential and necessary for the accomplishment of the purpose of the law. Therefore the burdensome provisions of a State quarantine law must be essential to the protection of the public health. A quarantine, under State laws, which is established for other purposes than the protection of health, is unconstitutional, for the above reason that, being no longer a *bonâ fide* exercise of police power, it abridges "the privileges or immunities of citizens of the United States," and, possibly, because it deprives persons of "liberty or property without due process of law," in violation of the Fourteenth Amendment. Under the power to regulate commerce, Congress can assume control of the whole subject of quarantine. From that time all State legislation upon the subject, in conflict with the laws of Congress, would be void. Hitherto, however, Congress has intentionally left the States free to regulate quarantine for themselves.

Blewett Harrison Lee.

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